THE HUMAN RIGHTS CODE, 1980, S.O.

1980, C. 340, as amended

IN THE MATTER OF the complaint made by Ms. Lucy Piazza, of Toronto, Ontario, alleging discrimination in employment by Airport Taxi Cab (Malton) Association and Mr. Gurdev S. Mann, Toronto International Airport, P.O. Box #62, Toronto AMF, Ontario, L5P 1A2.

B E F O R E:

PROFESSOR FREDERICK H. ZEMANS

A P P E A R A N C E S:

J. DOLEZEL, ESQ., -- For the Complainant and the Commission

A. TAYLOR, ESQ., -- For the Respondents

Introduction

On June 3, 1985, I was appointed as a Board of Inquiry under the Human Rights Code, S.O. 1981, c. 53, to hear and decide this complaint of discrimination in employment under the Human Rights Code, R.S.O. 1980, c. 340 (the "Code").

The Complainant, Lucy Piazza, alleges that the corporate Respondent, Airport Taxi Cab (Malton) Association (the "Association") and the Association's President, the individual Respondent, Gurdev S. Mann ("Mann" or the "Respondent") discriminated against her on the basis of sex, contrary to paragraphs 4 (1)(b) and 4 (1)(g) of the Code.

Although the Complaint filed as Exhibit 1 also names the Association's former Secretary-Treasurer, Mr. A. Malik ("Malik"), as a further individual Respondent, Malik was removed as a party on the consent of counsel. As another preliminary matter, the corporate Respondent's name was amended in accordance with its Letters Patent, Exhibit 3.

The Law

As stated at the outset, this complaint is governed by the Ontario Human Rights Code, R.S.O. 1980, c. 340. Breaches of the following provisions are alleged:

> 4.(1) No person shall,
>
> ...
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> ... or
>
> (g) discriminate against any employee with regard

to any term or condition of employment,

because of ... sex ... of such person or employee.

These prohibitions have evolved to the point that they encompass sexual harassment in a far-reaching manner. The evolution began with the decision of the Ontario Board of Inquiry in Bell v. Ladas and Flaming Steer Steak House Tavern, Inc., (1980) 1 C.H.R.R. D/155; (1980) 27 L.A.C. (2d) 227. There Mr. O. B. Shime concluded that sexual harassment in the workplace could constitute a breach of the identical paragraph 4 (1)(g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318. Chairman Shime further concluded:

> The forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender-based activity, such as coerced intercourse, to unsolicited physical contact, to persistent propositions, to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment. (L.A.C. 229)

Mr. Shime expressed the basis for his conclusion as follows:

> There is no reason why the law, which reaches into the work place so as to protect the work environment from physical or chemical pollution or extremes of temperature, ought not to protect employees as well from negative, psychological and mental effects where adverse and gender-directed conduct emanating from a management hierarchy may reasonably be construed to be a condition of employment. (L.A.C. 229)

Mr. Shime's analysis in Bell has found favour with other Ontario boards, the boards of other provinces, federal boards and the Ontario and Federal legislatures.

In Hughes and White v. Dollar Snack Bar and Deiter Jeckel, (1982) 3 C.H.R.R. D/206, the Ontario Board of Inquiry chaired by Professor Kerr adopted Mr. Shime's statement of the law and went on to add:

> In my view, harassment based on a factor in respect of which discrimination is unlawful is inherently in violation of the Ontario Human Rights Code since it singles out the victim for treatment on the basis of that factor. (D/1015)

In his first decison dealing with sexual harassment, Professor Cumming traced the development of sexual harassment in American jurisprudence and found that the approach there is similar to the broad approach set forth in Bell (Cox and Cowell v. Jagbritte Inc. et al., (1982) 3 C.H.R.R. D/609 at D/612). In particular, Professor Cumming referenced the U.S. Court of Appeals decision in Bundy v. Delbert Jackson, 641 F. 2d 934 (1981), (U.S.C.A. D.C. Cir.), which showed a willingness to relax the burden of proof on plaintiffs in sexual harassment cases:

> The plaintiff's argument in the case was that it should be unnecessary for her to show that there were tangible employment consequences, in the sense that benefits were denied to her as a a result of her rejection of sexual propositions. Rather, it was argued, she should only have to show that her employment circumstances were 'poisoned' by the harassment.
>
> The Court accepted that reasoning ...
>
> (Cox, D/612)

By the time of the decision of the Ontario Board of Inquiry in Mitchell v. Traveller Inn (Sudbury) Limited, (1981) 2 C.H.R.R. D/590 (decided October 7, 1981), the Bell approach was sufficiently entrenched to warrant the following conclusion from Chairman Kerr:

> It is now well established by the decisons of human rights tribunals in Ontario that sexual harassment as a condition of employment violates section 4 (1)(g) of The Ontario Human Rights Code, R.S.O. 1980, c. 340 as a discriminatory condition of employment and may constitute a violation of other provisions of section 4 (1) if a requisite related action, such as dismissal or refusal to hire, occurs ... (D/590)

The Bell analysis has subsequently been approved by Ontario boards of inquiry in Torres v. Royalty Kitchenware Limited and Guerico, (1982) 3 C.H.R.R. D/858 (Cumming), McPherson et al., v. Mary's Donuts and Doshoian, (1982) 3 C.H.R.R. D/961 (Cumming), Aragona v. Elegant Lamp Co. Ltd. and Fillipitto, (1982) 3 C.H.R.R. D/1109 (Ratushny), Olarte et al., v. DeFilippis and Commodore Business Machines Ltd., (1983) 4 C.H.R.R. D/1705 (Cumming), Watt v. Regional Municipality of Niagara and Wales, (1984) 5 C.H.R.R. D/2453 (McCamus), Giouvanoudis v. Golden Fleece Restaurant and Carras, (1984) 5 C.H.R.R. D/1967 (Cumming), and by myself in both Graesser v. Porto, (1983) 4 C.H.R.R. D/1569 and Fullerton v. Davey C's et al., (1983) 4 C.H.R.R. D/1626.

In Watt, supra, Dean McCamus drew from American legal literature in labelling two different categories of sexual

harassment. The first category of "quid pro quo" sexual harassment encompasses "situations in which an employee is forced to make a choice between submitting to sexual demands or forfeiting some employment benefit." The second category of "abusive environment claims" attack "the persistent subjection of female employees to an intimidating, hostile or offensive working environment." (D/2455)

Human rights tribunals in the provinces of Saskatchewan, Alberta, British Columbia and New Brunswick have also cited Bell with approval [respectively, Phillips v. Hermiz, (1984) 5 C.H.R.R. D/2450 (Katzman); Deisting v. Dollar Pizza et al., (1982) 3 C.H.R.R. D/898 (Clarke); Webb v. Cyprus Pizza, (1985) 6 C.H.R.R. D/2794 (Wilson); and Doherty and Meehan v. Lodger's International Ltd., (1982) 3 C.H.R.R. D/628 (Goss)].

In the federal sphere, Bell has been cited as authority for the conclusion that the creation of a humiliating working environment through sexual comments and advances constitutes sexual harassment contrary to the Canadian Human Rights Act [Potapczyk v. MacBain, (1984) 5 C.H.R.R. D/2285 (Lederman, Robson and Cumming)] Bell was also approved by the Federal Court of Canada in The Queen v. Robichaud, (1985) 6 C.H.R.R. D/2695.

Finally, the Ontario legislature seems to have approved of the interpretation given to the Code in respect to sexual harassment. In the Human Rights Code, 1981, the following specific provisions proscribe sexual harassment in the workplace:

> 6. --(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
>
> (3) Every person has a right to be free from,
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.
>
> ...
>
> 9.
>
> (f) "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome...

It should also be noted that a recent amendment to the Canadian Human Rights Act similarly provides for an express prohibition against sexual harassment. (1980-81-82-83, c. 143, s. 7)

In light of the foregoing, there can be no room for doubt that, even in the absence of a specific prohibition against sexual harassment in the workplace, the 1980 Code supports such a prohibition. In the cogent words of Professor Cumming in both Torres and Commodore, supra:

> There is no doubt that Boards of Inquiry, by their creative interpretations of the Human

> Rights Code, have made a substantial penetration into the workplace in order to eradicate an insididious form of discrimination. (Torres, D/862; Commodore, D/1715)

Caution must nevertheless be exercised in determining whether conduct in the workplace constitutes prohibited sexual harassment. As Mr. Shime recognized in Bell:

> One must be cautious that the law not inhibit normal social contact between management and employees or normal discussion between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee. An invitation to dinner is not an invitation to a complaint. (L.A.C. 229-230)

A similar concern for caution has also been voiced by Professor Ratushny in Aragona, supra:

> ...sexual references which are crude or in bad taste, are not necessarily sufficient to constitute a contravention of section 4 of the Code on the basis of sex. The line of sexual harassment is crossed only where the conduct may be reasonably construed to create, as a condition of employment, a work environment which demands an unwarranted intrusion upon the employee's sexual dignity as a man or woman. The line will seldom be easy to draw... (D/1110)

In Watt, supra, Dean McCamus held that offensive remarks made by a supervisor of a female employee of a road crew did not occur with sufficient frequency to create an abusive atmosphere contrary to the law. Dean McCamus found that "the incidents in

question would have to have a degree of frequency and offensiveness which would meet the 'condition of work' threshold of Section 4 of the Code." (D/2458) In conclusion, Dean McCamus rejected the view that virtually any insult or joke of an offensive nature which is based on the biological differences between the sexes can constitute an offence under the Code. He determined that such an interpretation would not reflect "sound social policy" and that:

> the burden which must be discharged in order to bring a case within Section 4 is to establish that the incidents occurred with a combination of frequency and offensiveness which warrants the inference that exposure to such conduct was a discriminatory condition of employment.
>
> (D/2459)

With the foregoing principles in mind, it is open for me to find that the Complainant was discriminated against by prohibited treatment on the part of Mann, which treatment might also have culminated in her termination. The burden rests on the Complainant to establish a case of sexual harassment. If a prima facie case is established at the conclusion of the Complainant's evidence then the tactical onus quite naturally shifts to the Respondents to show that for some reason the prima facie case does not, in fact, amount to sexual harassment. In most cases this will involve proof of either an alternative reason for termination, if indeed that has occurred, or proof that the conduct in question was not harassment in the circumstances.

THE EVIDENCE

The evidence in this case has been fraught with conflict. Much must therefore turn on credibility assessment. As Professor Kerr observed in Mitchell, supra:

> Frequently, when there is a sharp conflict in the evidence, it can be explained by the frailty of the human memory and the human tendency for memory to be influenced over time by one's self-interest. (D/591)

In the present case, however, the divergence in testimony between the Complainant and the Respondent, Mann, cannot be attributed to the frailty of the human memory. For the most part, Mann did not testify that the alleged incidents could be explained away as not being of a harassing nature. Rather, it was his position that they simply did not occur. Thus, there is a very severe problem of credibility.

The sharp conflict in evidence begins with the Complainant's terms of employment. The Complainant testified that she was looking for a permanent position and that she was under the impression that her secretarial position with the Association was a permanent one (III:220-221, 228). She also testified that she could not remember anyone ever telling her that her job would be terminated upon the return of the elected Secretary-Treasurer of the Association, Malik (III:2211). In contrast, Mann testified that the Complainant was hired as a temporary replacement for Malik. Both in testimony and in final argument there were

efforts to suggest that the Complainant had to have been hired on a temporary basis because the Association's By-Law No. 1 requires that an Officer of the Association -- such as the Secretary-Treasurer -- be a "member of the corporation" and that a member shall own a taxicab license plate with a Ministry of Transportation permit number (II:19-20). This argument is ill-conceived. If the unlicensed Complainant was hired to temporarily replace the Association's Secretary-Treasurer, then it would appear that the Association's By-Law was being breached. Thus, the Complainant's lack of qualification for the Association's office of Secretary-Treasurer lends credence to the conclusion that the Complainant was hired as a "secretary" (as opposed to a "Secretary" or "Secretary-Treasurer"). This also supports the proposition that the duration of the Complainant's employment was not dependent on the return of the Secretary-Treasurer, Malik.

Futhermore, Mann testified that he could not remember telling the Complainant that her job would be a temporary one (II:18, 97). Malik was more definite in his recollection. On cross-examination he testified that he never discussed the length of the Complainant's employment with her. More specifically, he testified that he did not tell the Complainant that when he returned to work her job would be terminated (II:197). This is understandable in view of Malik's testimony that he did not even tell Mann approximately when he would be able to resume his duties (II:186).

The Respondent's position that the Complainant was hired as a temporary replacement for Malik is further belied by Mann's testimony on cross-examination that the Complainant was hired as a "Secretary" (in contrast to "Secretary-Treasurer") to take Malik's "place" (in contrast to his "Office") (II:97). This is consistent with the Complainant's view that she was hired as a secretary (I:15; III:220) and that she knew nothing of the corporate structure of the Respondent Association (I:55, 59; III:226).

In the absence of the Manpower posting which I requested Counsel to endeavour to obtain -- and which, I suspect, if it had been available, would quickly determine this factual issue -- I find, as matters of fact, that the Complainant was hired for a permanent, secretarial position with the Respondent Association. Where the evidence of Mann and Malik conflict with the evidence of the Complainant on these points, I reject their evidence in favour of the Complainant's evidence.

The most blatant conflict in testimony relates to the allegations of sexual harassment. The Complainant testified that on the day of her job interview Mann had said that he had interviewed another girl who was very attractive (I:43). In retrospect, the Complainant found this reflected poorly on Mann's motive in hiring an employee.

The first offensive incident occurred approximately one month after the Complainant commenced her employment with the Association. On a Friday night as the Complainant was leaving to go home, Mann asked her if she could give him a hug. The

Complainant testified that she found this to be a strange question and that it caught her "off guard." (I:21-22) The Complainant refused, told Mann she had a boyfriend, and left for home (I:23). The Complainant returned to work on the following Monday without mentioning the incident. She testified that she was embarrassed and uncertain how to approach Mann (I:24).

It was also during the month of September that Mann started asking the Complainant to go out with him "all the time" and asking when she was going to take him out for a drink (I:24). According to the Complainant, Mann's persistence paid off when, again sometime in September, she agreed to accompany Mann after work for a drink. The Complainant felt that this would appease Mann and that he would stop bothering her. They went to the Skyline Hotel for "a drink" and, after two or three hours, the Complainant told Mann that she had to leave. Instead of returning to the taxicab compound, Mann parked near the back of a gas station near the compound where he forced a kiss upon the Complainant (I:25-26). Fearing that a sharp reaction would provoke a more serious attack, the Complainant asked Mann to stop and to drive her back to the compound, which he did. Again, the Complainant returned to work and did not discuss this incident with anyone, hoping that Mann would appreciate her disinterest and stop his advances (I:27-28).

The Complainant then testified that Mann continually asked her for rides home. She obliged him on several occasions and, in fact, Mann did the driving. One such occasion occurred approximately a few weeks after the Skyline Hotel incident.

Before driving to his own home in the Complainant's car, Mann parked at High Park and forcibly kissed the Complainant. She politely told Mann that she was not interested and that she wanted to go home. Again, Mann discontinued his advance and they parted ways. Again, the Complainant returned to work.

On another occasion Mann asked if they could stop at his new apartment building on Albion Road before driving him home. The purpose was purportedly to pick up his keys so he could move in the following week. When they arrived, Mann asked the Complainant to go up to see his penthouse apartment. She did. She thought that by this time Mann realized that she was not interested in his advances. However, Mann forced another kiss upon her while inside the apartment, and the Complainant insisted that they leave. At this point the Complainant testified that she did not trust Mann any longer. (I:32-33)

On another occasion Mann asked the Complainant to pick him up on the way to work and to come early so that she could join him in his new apartment for coffee. She insisted that if he wanted a ride to work he would have to be in the lobby. She refused to go up to his apartment. (I:34)

Sometime after this last incident Mann terminated the Complainant's employment, giving her one week's notice to find another job. Mann told her that the reason for her termination was her absence from work on the previous day. The Complainant testified that her absence was a result of her late lunch hour and a delivery she made to a dispatcher (her boyfriend) at the

airport. The Complainant testified that her boyfriend was a dispatcher with the Association at the time.

The Complainant testified to other occasions (anywhere from once to three times per day) when Mann called her into his office and discussed personal matters. On a few of these occasions the Complainant testified that he discussed his problem in "getting along with his wife." (I:39)

The Complainant also recalled a few occasions when Mann blew kisses at her when taxi drivers were in the office paying their dues (I:44-45). At the end of her testimony the Complainant also recalled another occasion when she allowed Mann to drive her car to his Albion Road apartment and he persisted for about one-half hour in asking for a kiss. The Complainant refused.

Mann quite simply denied everything. He did admit that he accompanied the Complainant to the Skyline Hotel, but suggested that the Complainant had in fact asked to accompany him (II:25). Mann also denied that any kissing attempt was associated with this incident (II:26).

Mann also admitted to driving with the Complainant on two other occasions. He testified in-chief that the Complainant drove him to the Roncesvalles and Queen area because she was going there to pick up a typewriter (II:27). On the second occasion Mann testified that the Complainant picked him up at his apartment in the morning and drove him to work (II:27). On cross-examination Mann gave a blanket denial that he had tried to kiss the Complainant on these or any occasions (II:124).

On cross-examination, however, Mann testified that he drove the Complainant's car on the occasion of the drive to the Roncesvalles and Queen area. He suggested the reason was that the Complainant did not want to wear her prescription glasses in front of him (II:118). This matter of car rides with the Complainant gave Mann considerable difficulty. The following exchange occurred on cross-examination.

> Q. Now, Mr. Mann, again, the complainant alleged that during the course of her employment you asked her if she could give you lifts home. Did you ask her to drive you home?
>
> A. No, the one occasion that she was going to pick up the typewriter, that's the only time.
>
> Q. That's the only time (?)
>
> A. Yes
>
> (II:116-117)

Yet Mann admitted that on the day of the Skyline Hotel incident he had asked the Complainant earlier in the day if she could drive him home (II:24, 119).

Another indication of the weakness and possible inaccuracy of Mann's testimony concerns the Complainant's allegation that she and Mann visited Mann's Albion Road penthouse apartment where Mann forced another kiss on the Complainant. When asked in examination-in-chief whether or not this occurred, Mann replied: "No, I don't recall it." (II:27) In my view, such a bold and serious allegation would warrant a more definite and determined denial. I have considerable concern with the veracity of the

Respondent Mann's testimony and I do not believe that he was truthful or forthright in giving his evidence. I do not believe his outright denial of physical contact with the Complainant.

The Complainant's testimony is not beyond suspicion either. The fact that she continued to consent to drive in the car with the Respondent, Mann, despite his advances, raises the suspicion that Mann's advances were not unwelcomed. However, as Mann did not offer the Complainant's consent as a defence, and as I find his outright denials to be incredulous, I am inclined to accept the Complainant's testimony over the Respondent, Mann's.

This conclusion is supported by the similar fact evidence of Ms. Vanda Salvaterra and Mann's response to that evidence. She testified that she worked for the Association for several days in December, 1981, doing general secretarial tasks. She was fired after a very short time, and on the day of her firing Mann offered her a ride home. Ms. Salvaterra alleged that Mann attempted to kiss her on this occasion.

The admissibility of similar fact evidence has been considered in a number of recent human rights decisons, including my own decision in Graesser v. Porto, supra. In Bell, supra, Chairman Shime concluded:

> The general rule relating to similar fact evidence is applicable to both criminal and civil matters and, thus, in my view it is applicable to matters falling under The Code. (231)

On the facts of Bell, the Board found that the proposed similar fact witnesses were not credible. Chairman Shime was even driven to adopt one of the admonitions in DPP v. Boardman, [1975] A.C. 421 (C.A.), against the admission of similar fact evidence which might be falsely concocted (232). Furthermore, Chairman Shime found that certain of the proposed similar fact evidence did not meet the test of admissibility as it did "not suggest a particular system or particular peculiarity" (238):

> ...I am not prepared to find that the alleged sexual overtures made to the two complainants were so unusual, or bore such a striking similarity, that the evidence of each of the complainants should be treated as similar fact evidence having some probative value in the other's complaint. (239)

In the interim decision of Chairman Cumming in Commodore, (1983) 4 C.H.R.R. D/1399, the test of admissibility was restated as follows:

> The fundamental issue in determining admissibility of similar fact evidence is its probative value to the issues before the tribunal. That is, is the similar fact evidence relevant to the issues before the tribunal? However, given the possible prejudicial impact of similar fact evidence, its admission is exceptional and its admissibility should be considered with caution. The probative value of the evidence is to be weighed against its prejudicial impact. (D/1401)

In the appeal of Commodore to the Ontario Divisional Court, [(1984) 84 CLLC 16, 206], Steele J. cited subsection 15 (1) of the Statutory Powers Procedure Act, R.S.O. 1980, c. 484,

in support of Chairman Cumming's ruling on the admissibility of similar fact evidence (16,207). That subsection provides:

> ... a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

In determining whether the evidence of Ms. Salvaterra should be admitted in the circumstances of this case, I find it useful to repeat several of my observations from Porto, supra:

> When dealing with matters involving sexual harassment... one rarely encounters the situation where the offence or alleged offence takes place in the open, and therefore can be proven through eye witness testimony. That is, rarely will one sexually harass another in full public view. Rather, these events usually take place behind closed doors or with no witnesses present. Such being the case, if similar fact evidence were excluded, the trier of fact would be faced with having to decide an issue based solely on the evidence of the parties before him. In situations where there is some doubt as to what actually happened, the trier of fact may have difficulty in deciding the matter. Nonetheless, he or she must decide the issue. Extraneous sources of evidence come into play within this context, and where such is the case, the trier of fact should be receptive to similar fact evidence. The evidence is not admitted to establish the guilt or innocence of the accused, but rather, to enable the decision maker to make a more informed decision. The similar fact evidence can be used to corroborate testimony previously given. It should not be used if the evidence will unduly

influence the trier of fact. (D/1572)

The present case is one in which there is considerable doubt as to what actually happened. Since Ms. Salvaterra's evidence concerns the same individual Respondent and since her evidence goes to demonstrate a similar modus operandi, I find that it has the requisite probative effect. I also find that its admission would not unduly prejudice the Respondents.

The quality of Ms. Salvaterra's evidence was effectively attacked both on cross-examination and in final argument. She could not remember any details of her employment prior to her employment at the Association. She could not remember exactly what she did when she was employed by the Assocation and, indeed, she could not remember exactly how long she was employed by the Association. Nevertheless, the fact remains -- admitted by Mann -- that Mann offered this employee a ride home. Mann claimed this ride occurred after he fired Ms. Salvaterra while she recalled the ride home being prior to her layoff. The fact also remains that the employment interview was similarly cursory and that Mann hired Ms. Salvaterra on a Tuesday (with instructions for her to commence work the following day) knowing that she would have to be taught how to prepare the payroll and issue cheques -- all by noon on Thursday! (II:10-11) Even if Ms. Salvaterra's evidence of Mann's attempt to kiss her is not to be believed, her evidence (and Mann's response to it) is valuable in further assessing the cavalier character and questionable motives of Mann. On cross-examination, Mann testified that it would take an experienced person one hour to complete the

Association's payroll. Yet he further testified that he spent "two or three" hours instructing Ms. Salvaterra to do the task (II:150). Under long-term employment conditions, such an investment of supervisory time would not seem unreasonable, but Mann admitted that this was strictly a "three or four day job" for the sole purpose of covering Malik's second absence and for issuing the cheques on Thursday (II:10).

Having reviewed the contradictory evidence of the Complainant and the Respondent, I have concluded that the Complainant was discriminated against pursuant to Section 4 (1)(g) of the Code during her employment with Respondent Association. The discrimination took the form described by Dean McCamus in Watt, supra of an "abusive environment claim" in which the Complainant was subjected to an intimidating and hostile working relationship. Considering the close working relationship of the Complainant and Mann, it is believable that she was intimidated by him and tried to keep the relationship a business one in face of his continuing attempt to socialize with the Complainant and to develop a more intimate relationship. I believe the Complainant's testimony and where there are contradictions between her evidence and the Respondent, I accept her version of the facts. I therefore find that there was discrimination pursuant to Section 4 (1)(g) of the Code.

It remains to determine whether sexual harassment was the

proximate cause of the Complainant's termination, contrary to paragraph 4 (1)(b) of the Code.

The quality of the Complainant's work performance was also the subject of conflicting testimony. The Complainant testified that Mann was happy with her work performance and that nobody ever complained about it (I:37-38). On the other hand, both Mann and Malik voiced some dissatisfaction with the Complainant's work performance. Mann's primary concern was with the Complainant's inability to keep the "Association's books" (II:22). I understood the "Association's Books" to include the Daily Record Book which was introduced as Exhibit 2. However, a review of that Exhibit indicates that the Complainant made regular entries from August 18, 1981 to October 26, 1981. On cross-examination Mann testified as follows:

> Q. So during her employment she kept these entries regularly every day except for once?
>
> A. Yes.
>
> Q. And you told her about it and she corrected it?
>
> A. That's right.
>
> Q. And went on keeping it again.
>
> A. That's right.
>
> (II:102)

The Complainant testified that entries in the Daily Record Book were for Mann's benefit and that she was instructed to make

such entries if she had the time. (I:64) She had no excuse for the entries missing after October 26, 1981 other than she was very busy and did not have the time (I:67). I find this testimony hard to believe in view of the Complainant's description of her next-to-last day of work when she was not busy and decided to make a delivery to her boyfriend at the Airport (I:34). Nevertheless, in view of the Complainant's overall consistency in keeping the Daily Record Book, I am not prepared to find that her failure to make entries for the three days of October 27, 28 and 29, 1981 constitutes the probable cause of her termination on October 30, 1981.

There was some indication that the Complainant's work performance might have been inadequate in regard to keeping of a general ledger (II:22, 100). However, the Respondent failed to introduce the ledger in proof and, on cross-examination, Mann testified as follows:

> Q. Monthly entry, did we talk about this before?
>
> A. Yes, we talked about it before.
>
> Q. This is the monthy balancing perhaps, monthly closing?
>
> A. Yes.
>
> Q. Is it the same thing?
>
> A. It has to be there and it has to be balanced and even if you don't know how to balance the books you have to do the entries up to the time.
>
> Q. Up to the time.
>
> A. Yes.

Q. In the ledger.

A. Yes. So that's got to be there, it takes time to put in there, but she didn't do that.

Q. She didn't do that. Was it on one occasion or more occasions?

A. Well, I can recall it only once.

(II:107-108)

Mann further testified that bookkeeping was the most important part of the position which the Complainant held (II:17). He also acknowledged that, "after about two or three weeks, she certainly knew how to do the payrolls..." (II:21)

Malik testified that the Complainant's work performance was unsatisfactory. His criticism extended to "the bookkeeping and the job." (II:172) On cross-examination Malik stated that the Complainant made mistakes "everywhere." (II:195) However, he had great difficulty elaborating (II:188). In contrast to the testimony of Mann, Malik testified that the Complainant did not do the payroll properly (II:191). Malik granted that the Complainant was an "average" learner who kept promising to try. (II:197,187)

In light of my findings in respect to the keeping of the Daily Record Book, the inconclusive evidence regarding the general ledger, and the vague and conflicting criticisms of Malik, I find that the Complainant adequately discharged what was acknowledged to be the most important aspect of her job. I further find that the Respondents failed to establish that the Complainant's incompetence was the proximate cause of her

dismissal. The Complainant has established that her sex was an aspect of her termination and that she was being discriminated against contrary to paragraph 4 (1)(b) of the Code.

Remedy

Both Mann and the Association are responsible for the contraventions of the Code that have been identified. Corporate liability under the Code was explained by Professor Cumming in Commodore, supra, as follows:

> ...where the employer is a corporate entity, and an employee is part of the 'directing mind' of the corporation, then the employer corporation is itself personally in contravention of the Code. The act of the employee becomes the act of the corporate entity itself, in accordance with the organic theory of corporate responsibility. In such a situation, the intent of the offending employee is attributed to the corporate entity, so that the corporate entity cannot be excused on the basis that it (being a legal, and not real, personality) could not possibly intend to discriminate. (D/1746)

As President of the Association, I have no doubt that Mann is properly characterized as a "directing mind" of the corporation. I also find that the Association is legally responsible for his actions.

Counsel for the Commission sought special damages to compensate for the Complainant's unemployment from October 30, 1981 to January 25, 1982 at the rate of $250.00 per week. Such an award is, of course, subject to the Complainant's duty to mitigate her losses through reasonable efforts to obtain

alternate employment. The Complainant testified that she started looking for another job immediately upon termination (III:226) and that, in addition to applying to Manpower, she looked for jobs "through newspapers" and "through applying with different offices." (III:223) There is no reason to doubt the sincerity of her efforts.

For the purpose of calculating special damages, Commission Counsel also urged me to ignore any unemployment insurance premiums that the Complainant might have received. In this regard, I adopt the approach of Professor Cumming as stated in Torres, supra:

> ...the proper approach is to not take account of Unemployment Insurance benefits in the calculation of special damages. Under the Unemployment Insurance Act, a complainant or a respondent may have an obligation to repay benefits, but that subsequent obligation should not affect the award that a Board of Inquiry may make in the first instance.
>
> (D/872)

Commission Counsel sought general damages for emotional pain and suffering in the amount of $1,000.00. Again I find it helpful to refer to Professor Cumming's decision in Torres, supra. There the factors that should be considered in awarding general damages in cases of sexual harassment were carefully reviewed and identified as follows:

> (i) The nature of the harassment, that is, was it simply verbal or was it physical as well?

(ii) The degree of aggressiveness and physical contact in the harassment;

(iii) The ongoing nature, that is, the time period of the harassment;

(iv) The frequency of the harassment;

(v) The age of the victim;

(vi) The vulnerability of the victim; and

(vii) The psychological impact of the harassment upon the victim.

(D/873)

On all of the evidence, I am not convinced that this is an appropriate case to award significant general damages. The incidents of harassment did not, in my opinion, have a significant effect on the Complainant: she was offended at most. The evidence does not indicate that the Complainant has been left emotionally scarred by these events. She testified as to the success of her calm and polite efforts in refusing Mann during each of his advances. I am also mindful of the fact that the Complainant continued to work without raising the matter of her sexual harassment with anyone. In these circumstances I find that a general damage award of $250.00 is appropriate.

ORDER

For the foregoing reasons, this Board of Inquiry orders as follows:

1. The Respondents, Gurdev S. Mann and Airport Taxi Cab (Malton) Association are jointly and severally liable to pay forthwith to the Complainant the following:

   (a) as special damages for lost wages, the sum of two thousand, seven hundred and fifty ($2,750.00) dollars,

   (b) as general damages, the sum of two hundred and fifty ($250.00) dollars,

   a total amount of three thousand ($3,000.00) dollars.

2. The Respondents, Gurdev S. Mann and Airport Taxi Cab (Malton) Association shall desist from any sexual harassment, of any and all, employees who currently are employed by or who may be employed by the Respondent Association.

3. The Respondent Association shall immediately post in their offices a copy of the Ontario Human Rights Code, 1981.

Dated at Toronto this day of October, 1985.

FREDERICK H. ZEMANS